Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

REPLY BRIEF OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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November 30, 2000

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REPLY BRIEF FOR RESPONDENTS AL GORE, JR., AND THE FLORIDA DEMOCRATIC PARTY

Barely four days after this Court granted review in this case, petitioner has abandoned the principal ground on which his Petition for Certiorari rested: his assertion that 3 U.S.C. § 5 "requires" the States to act in a particular way in resolving controversies over the appointment of electors. Pet. i (Question 1); *id.* at 13, 16 n.4, 18. Petitioner now concedes that the statute does not *mandate* anything but simply sets forth a safe harbor protection against possible (currently only hypothetical) disputes in the Electoral College. Pet. Br. 17, 29.

While this concession all but demolishes petitioner's case, it does not prevent him from making a series of remarkable requests of this Court.

To begin with, he asks this Court to review a state-law claim involving garden variety principles of statutory interpretation. He mischaracterizes the Florida Supreme Court's decision, all but ignoring a central provision of the Election Code governing manual recounts. Yet in the end, as an examination of his brief will reveal, petitioner's argument of usurpation rests on that portion of the state court's decision determining the scope of the Secretary of State's discretion under a Florida statute to ignore ballots that were being counted pursuant to another statute's direction.

That decision was as routine as petitioner's request for federal court intervention is remarkable. Yet, perhaps because he recognizes that the decision below presents such a weak case for a claim of judicial "legislation," petitioner makes the implausible contention that *any* state judicial decision in this context – and, by implication, any state attorney general opinion or administrative ruling – is suspect if it is not "dictated by" existing statutes. Pet. Br. 21. To implement this federal judicial superintendence over each State's processes for choosing electors, petitioner would have the federal courts draw upon *Teague* v. *Lane*, 489 U.S. 288 (1989), not to *shield* state courts from federal intrusion as *Teague* sought to do but – standing *Teague* on its head – to use it as a sword to cut down state court rulings construing election statutes as applied to presidential

electors. Any such attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.

To make so weak an argument might seem barely worth the candle until one sees petitioner's final request: He seeks a form of relief to which he could not possibly be entitled – vacatur. He says that such relief will "imbue the election with * * * finality," Pet. Br. 50, but he fails to explain how it could. Petitioner appears to seek nothing less from this Court than a declaration not only that the decision below was wrong, but that the Florida vote was certified on November 14 – not when it actually was, on November 26 – so that he can argue elsewhere that respondents' post-certification challenges to the election results should be tossed out as untimely. He seeks not just to run out the clock but, extraordinarily, to have this Court turn back the clock in pending Florida contest proceedings so that he can declare the game over.

While state courts are still struggling to determine whether all the lawfully cast ballots will be counted, petitioner seeks to secure this Court's blessing for leaving to historians the question of who garnered the most votes for President in the State of Florida on November 7, 2000.

This breathtaking combination of requests is pressed upon the Court in the name of order, finality, and the rule of law. In truth, petitioner seeks this Court's assistance in bending settled legal doctrines and deeply rooted constitutional principles, and in disregarding the plain language of congressional enactments – all based on a distorted view of the Florida Supreme Court's decision.

Ours is a different view, one that harmonizes this Court's decisions about federalism with its long-standing role in interpreting the Constitution and laws. Nothing in Article II or Title 3 prevents a state legislature from giving a state court the power to interpret its Election Code. Here, Florida's legislature did exactly that, just as many other States have. There is no basis for upsetting the decision of the Florida Supreme Court.

I. THE FLORIDA SUPREME COURT'S DECISION RECONCILING INCONSISTENT STATUTES DID NOT ENACT NEW LAW OR ABROGATE EXISTING LEGISLATION.

The Florida Supreme Court's decision was an interpretation of, not an amendment to, Florida statutes enacted prior to election day. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) (when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. * * * Thus, it is not accurate to say that the * * * Court's decision * * * 'changed' the law that previously prevailed * * * ."). Whatever else may be said, it is clear that the Florida Election Code contains two provisions about filing deadlines, an older provision that says some late returns "shall be ignored," and a more recent one that says those returns "may be ignored." Compare Fla. Stat. § 102.111(1) with *id.* § 102.112(1). The Florida legislature exhibited its understanding of the difference between "shall" and "may" in 1989. Pet. Br. 22-23 n.6. Petitioner's effort to sweep aside any tension in the Election Code by chalking it up to "different terminology," *id.* at 4, misreads the statute and the Florida Supreme Court's opinion below.

Strikingly, petitioner's argument on the supposed errors committed by the Florida Supreme Court (Pet. Br.19-27) quotes Fla. Stats. §§ 102.111, 102.112, and 102.168, but fails even to cite the crucial statute – Section 102.166, which provides for recounts. That statute, among other things, provides that county canvassing boards "shall" conduct county-wide manual recounts when (as here) a sampling reveals errors that could have affected the election. The Florida Supreme Court was well within the bounds of ordinary statutory construction in holding that the Secretary of State did not have discretion to disregard the results of a recount that the statute requires the canvassing board to conduct. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" of tax statute); *Sanderson* v. *United States*, 210 U.S. 168, 175-76

(1908) (interpreting statute to allow court to grant new trial motion beyond two-year time limit for "grant" of such motions, because the motion could be made "at the last moment before the expiration of the two years"). Nor does petitioner acknowledge the plain text of the Florida Election Code, which states that the "official return of the election" must include "write-in, absentee and manually counted results." Fla. Stat. § 101.5614(8).[1]

Petitioner complains that the Florida Supreme Court in effect changed Section 102.112 to read "may not ignore" rather than "may ignore." Pet. Br. 23 (statute "at most" "leaves the power to exercise compliance with the certification deadlines to the Secretary's discretion").[2] That accusation is incorrect. The Florida Supreme Court first held that, under the statute, the Secretary of State "is permitted to ignore the returns." Pet. App. 28a. Only then did the court examine the basis for the Secretary's decision in this case, based on the record, and hold, "consistent with the Florida election scheme," *id.* at 35a, that the reasons proffered by the Secretary for rejecting the amended vote counts were inadequate as a matter of law. *Id.* The court's

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[1] The houses of the Florida Legislature have filed a brief in support of neither party taking the view that "it appears" that "there may have been" departures from previous law in the Florida Supreme Court's decision. Fla. Legis. Br. 11. The Florida Attorney General, the state's chief law enforcement officer with the authority to issue opinions on Florida law, has taken a different view. See Fla. Att'y Gen. Br. 5-8. In any event, the Florida Constitution charges the Florida Supreme Court, not the Florida Legislature, with the ultimate duty to interpret state law. Nor are the views of the contemporary legislature entitled to any special weight with respect to the proper method of reconciling a 1951 statute (102.111) with a 1989 statute (102.112).

[2] At times, petitioner attempts to complain of a supposed change in the manner by which the manual recounts are conducted. *E.g.*, Pet. Br. 7, 25 n.8. But this Court denied certiorari in *Siegel* v. *LePore*, No. 00-837 (Nov. 24, 2000), and denied review of the question presented in this matter that related to the conduct of the manual recount. See *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 24, 2000) (Order granting certiorari). Petitioner's claim regarding the manner in which the recounts are conducted is thus outside this case altogether.

decision was a routine application of basic administrative law principles.

Petitioner focuses repeatedly on the Florida court's use of its "equitable" powers. Pet. Br. 11, 13, 21-22, 25, 26, 34, 46. But there should be no confusion. The court did not use its equitable powers in either aspect of the decision of which petitioner complains. Petitioner objects to the Florida court's holding that the November 14 deadline was not absolute – that is, that the Secretary was permitted to accept supplemental returns after November 14 – and to the court's imposition of a limit on the Secretary's discretion to "ignore" manually counted ballots submitted after that date. The court reached those two holdings on the basis of ordinary principles of statutory interpretation, not on the basis of equitable powers. Pet. App. 23a-25a, 31a-35a.

Nor is there anything to the charge that the Florida Supreme Court "amended" the statute by setting a deadline of November 26. Only after determining that the Secretary had violated the law did the court use its equitable powers to craft a remedy, in the form of new deadlines. The creation of such a remedy is an inherently judicial task, not a legislative one. In fact, the court used its equitable powers only to provide a *benefit* to petitioner in setting an outside date for the completion of the hand recounts. Respondents did not seek to have *any* deadline imposed. But the court decided, in the special circumstances of this election, to set an outside deadline for completion of the manual recounts.

The court's use of its equitable power thus worked no unfairness to petitioner. Allowing the legislature's manual recount provisions to be given effect is not like changing the rules after the game has been played. Cf. Pet. Br. 27, 28. It is instead like using a more powerful photo-finish camera – indeed, one already mandated by the legislature – to determine the winner of the race more accurately.[3]

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[3] *Carmell* v. *Texas*, 529 U.S. 513 (2000) (cited in Pet. Br. 20), involved a change in rules "advantageous only to the State, to facilitate an easier conviction." *Id.* at 1633. Here, the purpose and effect of the Florida Election

II. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH THE SAFE HARBOR PROVISION OF 3 U.S.C. § 5.

1. Petitioner has failed to demonstrate that the Florida Supreme Court's decision would take Florida's subsequent appointment of electors outside the safe harbor of 3 U.S.C. § 5. To begin with, he continues to insist that the statute requires the Florida courts to use the *substantive rules* that were in place at the time of the election. This notion flies in the face of the statute's plain language, which provides that a safe harbor shall be given to determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5. It is thus the state's *dispute resolution process*, "by judicial or other methods or procedures," that must be in place before the election is held, and that must come to a conclusion six days before the electors meet.

As demonstrated in our brief on the merits, Resp. Br. 32, Florida law undeniably meets that requirement: the dispute-resolving procedure in place on election day did not change in any way. Petitioner does not disagree but argues only that the "contention" that 3 U.S.C. § 5 is "satisfied * * * by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable," and "would offer none of the protections that Congress sought to achieve in enacting the statute." Pet. Br. 18-19. But he does not even bother to address the statute's plain language, nor does he come to terms with the extensive legislative history demonstrating that such a delegation would precisely serve Congress's purpose. See Resp. Br. 32-33.

Nor does petitioner even succeed on his own terms in demonstrating that the decision of the Florida Supreme Court

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Code, as construed by the state supreme court, is to improve the accuracy of the vote count – not to benefit one particular side over another.

was anything more than an application of "laws enacted prior to" election day. See Part I, *supra*. While he argues at length that the decision was erroneous, he cannot demonstrate that the Florida court's decision amounted to an "enact[ment]" of a new law within the meaning of 3 U.S.C. § 5.

Because, on close examination, the decision below is a routine case of statutory interpretation, petitioner takes the extreme and remarkable position that a state court may never resolve a dispute under state law about the appointment of electors if its decision would amount to a "new rule" within the meaning of – of all cases – *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. Br. 20. While this Court should not lose sight of the fact that 3 U.S.C. § 5 is not concerned *at all* with the provenance of the *substantive* law applied by state courts, petitioner's extraordinary contention must be addressed. *Teague*, as this Court is well aware, sets out the standard for when a federal habeas court can take the extraordinary action of upsetting a state court criminal conviction on collateral review. It holds that this exceptional power may be exercised only when a decision contrary to that announced by the state court was "*dictated* by precedent." *Id.* at 301 (opinion of O'Connor, J.). *Teague* provides an appropriately narrow scope for federal court review of state court decisions. But *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation unless the result is "*dictated*" by pre-existing statutes.

Teague is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioner would turn *Teague* on its head, transforming this rule designed to shield state courts into a sword by which the federal judiciary, in

challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioner would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the *Teague* standard as applied by petitioner would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context. It would also be contrary to the purpose of Title 3 – a statute designed to regularize the States' determination of challenges to the appointment of electors – to accord the statute this disruptive effect.[4]

2. As this Court suggested in the question it directed the parties to brief, even were this Court to find that the Supreme Court of Florida's decision took Florida's selection of electors outside the safe harbor provision, this Court could afford no judicial remedy. Section 5 does no more (and was carefully designed to do no more) than provide a State's slate of electors a safe harbor secure from challenge in Congress when the statutory prerequisites were met. The text plainly states that, "[i]f any State shall have" satisfied various criteria, its determination of its electors "shall be conclusive * * * so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. That much is not in dispute. Indeed, petitioner has now abandoned the position he pressed just days ago that the failure to satisfy the criteria of Section 5 would entirely invalidate Florida's slate of electors.

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[4] If this Court were to decide whether 3 U.S.C. § 5 embodies a standard for determining whether a state judicial statutory interpretation is so novel as to run afoul of federal law – which respondents do not believe is necessary to resolve this case – that standard would surely display much more deference to state courts.

Petitioner's new position is that this Court should vacate the decision of the Florida Supreme Court so that "executive officials in Florida would be able to discharge all of their duties" and "Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission." Pet. Br. 13-14. There simply is no foundation for such a request.[5] Section 6 of Title 3 requires the governor of each State to certify the State's electors based on the "final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment" – a provision that notably is not limited to state law existing prior to election day.

In addition, Congress debated the provision ultimately codified as Section 5 for more than a decade and did not adopt the remedy petitioner proposes. To the contrary, the legislative history is unambiguous that Congress intended that noncompliance with Section 5 would do *no more* than put the outlier State beyond the safe harbor its text expressly provides. See Resp. Br. 23-28 (quoting, *e.g.*, 18 CONG. REC. 75 (Dec. 9, 1886) (statement of Rep. Eden) ("The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.")). Of particular note, petitioner would have this Court adopt as a supposed remedy under Section 5 a ruling appointing electors favorable to him, directly contrary to the statutory scheme under which Congress itself must make the choice between competing slates of electors. See 3 U.S.C. § 15.[6]

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[5] Contrary to petitioner's assertion, Pet. Br. 32 n.10, decisions arising under the Extradition Clause of Article IV, § 2, cl. 2, and implementing legislation, 18 U.S.C. § 3182, preserve rather than undermine state autonomy and do not support the proposition that state electoral officials effectively act as federal "deputies." See *California* v. *Superior Court*, 482 U.S. 400, 407 (1987); *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890).

[6] Petitioner takes irreconcilable positions with respect to Section 5. First, petitioner has maintained that 3 U.S.C. § 5 renders any method of appointing electors enacted subsequent to November 7 *invalid* as a matter of federal law. Yet he simultaneously maintains that the State Legislature may at any time appoint a slate of electors that Congress would be required to recognize.

A State's final determination made in noncompliance with Section 5's safe harbor provision would deprive the State only of the "benefit" "confer[red]" on it by Congress – the "benefit" of protection for its finally determined slate of electors from challenge in the House and Senate. Pet. Br. 17. But this Court lacks the power to reverse a State's decision to forgo a benefit the federal government need not have offered in the first place. For example, where Congress conditioned receipt of federal highway funds on States' adopting a twenty-one-year-old drinking age, this Court made clear that a decision not to do so "remain[ed] the prerogative of the State[]." *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987). If there had been a dispute about what a State had done and the State's highest court determined that it had adopted the younger age, it would not be entitled to the federal funds – but the state court decision plainly could not be reversed or vacated by this Court to avoid that consequence.[7] At most, then, the consequence of a determination by this Court that Section 5's conditions were not met might be to render the safe harbor provision inapplicable to Florida's selection of its electors, which might then not be "conclusive" in the event of a future dispute before Congress pursuant to 3 U.S.C. § 15.[8]

Second, petitioner asserts that this Court should construe 3 U.S.C. § 5 implicitly to confer upon federal courts the authority, untethered to either the text or the legislative history and never before suggested in an opinion of any court, to strike down a state court's interpretation of state law and potentially invalidate the slate of electors selected pursuant to state procedures under the authority of Article II, § 1. This, he maintains, is a simple matter of statutory construction. But the Florida Supreme Court's detailed analysis of the Florida Election Code, relying on settled principles of statutory construction, he regards as a lawless act of legislation.

[7] Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981) ("[T]he typical remedy for state noncompliance with federally imposed conditions [on a government benefit] is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

[8] A declaration that Florida's appointment of electors was not made subject to a "final determination" deemed "conclusive" by the statute might not have even that consequence if, in the end, the outcome of this election is not affected by the action of the Supreme Court of Florida because the final margin of victory proves to be greater than any shift in the vote count attributable to it.

Petitioner objects to this conclusion because, he argues, the Florida judiciary should not be able to prevent the State from obtaining the conclusive presumption set out in Section 5. Pet. Br. 31. He argues that it would frustrate Congress's purpose if state courts could issue "binding orders" that would deprive the State of the protection of Section 5. *Id.* at 30.

To begin with, this concern simply reflects his misreading of the statute. The presumption attaches whenever the State's dispute resolution process was set up before the election, not whenever a court that is part of that process adheres to any particular provision of "pre-existing" law. As a result, the judiciary *cannot* prevent the State from obtaining the protection offered by the statute by making a novel but routine construction of statutory gaps and ambiguities – so the decision below certainly could not have the effect of taking Florida outside the statute's safe harbor. But, in any event, petitioner is simply stating a complaint about the nature of state government. Section 5 leaves the choice of how to proceed to the States and, as this Court long ago observed, "[a] State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Ex parte Virginia*, 100 U.S. 339, 347 (1879). Just as it would be a matter of indifference as far as federal law were concerned whether a State adopted an under-twenty-one drinking age as a result of legislative or judicial action, so it would be a matter of indifference to federal law precisely which branch of a State's government had acted in a way that prevented the State from meeting the statutory condition of 3 U.S.C. § 5.

Petitioner also argues that significant consequences may flow from the decision below if it means the State's determination of its electors will not comply with the conditions in 3 U.S.C. § 5. Pet. Br. 30-34. Of course they may. But 3 U.S.C. § 5 still

contains no legal prohibition. Thus, while someone, even an official of another branch of state government, might have a complaint about an action that denied the State's electors the protection of Section 5, there would be nothing *unlawful* about it, and therefore no basis for this Court to order vacatur or reversal.

In any event, having conceded that Section 5 is just a safe harbor provision that would give "conclusive" effect to a State's determination of its electors if, as happened during the Hayes-Tilden election, more than one return purporting to contain the electoral votes of that State were to be received by the President of the Senate, petitioner has also necessarily conceded that it would be improper for this Court to rule on whether the procedure by which Florida will determine who its electors are complies with the statute.[9]

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[9] It would plainly be premature for this Court to address compliance with Section 5, because no one in Congress has purported to rely on its provisions in determining whether the votes of electors from Florida shall be counted. Indeed, there has not been submitted "more than one return or paper" purporting to contain the ballots cast by Florida's legitimate electors. 3 U.S.C. § 15. And, even if 3 U.S.C. § 5 were read more broadly than the language of 3 U.S.C. § 15 appears to permit, so that it provided a safe harbor not only in cases where more than one set of votes might be received, but in *any* case in which objection would be made by a Senator and a Representative under 3 U.S.C. § 15 to an electoral vote, no such objection has yet been made to any electoral vote cast by any elector from the State of Florida. Petitioner's complaint about 3 U.S.C. § 5 at present thus involves only "uncertain or contingent future events that may not occur as anticipated, or that may not occur at all." 13A Charles A. Wright, et al. FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3532 (2d ed. 1995 & Supp. 1998).

Should the State of Florida appoint electors to whom petitioner objects, and should there then be some dispute about who the lawful electors from the State of Florida are, or whether the votes cast for the State of Florida in the electoral college are lawful, 3 U.S.C. § 5 might conceivably be invoked. If it is, and if petitioner believes he will be injured by its invocation, he will then be able to bring his "legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 734 (1998). Petitioner urges this Court to "eliminate the potential for a constitutional crisis" by ruling now on his Section 5 allegation. Pet. Br. 35.

3. The Florida Legislature wisely rejects petitioner's view, see Fla. Legis. Br. 1 (arguing that the only effect of 3 U.S.C. § 5 is that "Congress will regard the results of [the state] process as conclusive of which Electors were appointed in the manner directed by the State Legislature"), but propounds an entirely different theory for invalidating the Florida Supreme Court's decision that also contradicts the statutory text and the legislative history. The Legislature's Brief maintains that the failure to satisfy the criteria of Section 5 somehow triggers a state legislature's right to appoint a slate of electors under 3 U.S.C. § 2. Fla. Legis. Br. 2. But Section 2 says no such thing, providing simply that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State shall direct." It is fallacious to equate a situation where a State "has failed to make a choice" on election day, 3 U.S.C. § 2, with one where the procedures by which it has determined who its electors are is not entitled to the statutory presumption purportedly created by 3 U.S.C. § 5.

Finding no support in the text of Section 2, the Florida Legislature turns to the historical argument that Sections 2 and 5 are linked because they were enacted together "as part of the Electoral Count Act of 1887," relating to the "count[ing of] electoral votes," Fla. Legis.Br.5 – an argument that is simply incorrect: Section 2 was enacted more than *four decades* before Section 5 (1845 versus 1887) as part of a bill entitled "An Act to Establish a Uniform Time for Holding Elections for Electors of President and Vice President in all the States of the Union." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. The function of Section 2 was simply to address the circumstance in which a winner failed to emerge (as when a required majority of the votes was not secured by any candidate) under an election held pursuant to 3

But, as history reveals, a Court that seeks to avoid some future crisis by abandoning the traditional rules of judicial restraint does so at its – and the nation's – peril.

U.S.C. § 1, which *was* enacted contemporaneously with Section 2. When Congress later enacted Section 5, it did not refer to Section 2 either explicitly or implicitly (compare 3 U.S.C. § 6 (referencing determination made under § 5), § 15 (explicitly cross-referencing § 5)) and, as noted above, the legislative history of Section 5 plainly shows that Congress regarded that statute as doing nothing more than providing a safe harbor from congressional challenge of electors.

Finally, petitioner's reference to the possibility of direct legislative appointment of electors by the Florida Legislature raises a host of constitutional issues. Further, it is not self-evident that such direct appointment is even available. Article II, § 1, cl. 4 empowers Congress to "determine the Time of chusing the Electors." In 3 U.S.C. § 1, Congress has set a uniform national date for this process, which in the year 2000 fell on November 7. There is no doubt that Florida *made* its choice on that date, although by a vote so close and under a counting process so flawed that the State's courts are still attempting to "ascertain[]," 3 U.S.C. § 6, what that choice was. Accordingly, any state legislative attempt simply to appoint electors after the fact would appear to be federally preempted. See U.S. Const. Art. VI.

III. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH ART. II, § 1, cl. 2.

1. Petitioner would have this Court read Article II, § 1, cl. 2 as a command to every State that it either exclude both its judiciary and its executive from any role in pronouncing upon the meaning of the statutes through which its legislature "may direct" the appointment of presidential electors, or expressly delegate to them its constitutional duty to perform that task – ignoring the oddity of giving each State only this choice between extremes, and of ruling out the option every State appears to have chosen, in which courts and executives play their accustomed role of construing the legislature's handiwork. Far from promoting state accountability (Pet. Br. 37), petitioner's

approach would hinder the operation of state government and substantially increase federal interference in state affairs.

Indeed, petitioner's reading of Article II would have anomalous results: because Article II, § 1, cl. 2 pertains only to presidential elections, state court interpretive rulings would be invalid (under petitioner's view) only in that context. Yet state election codes are general statutes covering state and local as well as federal elections. Thus, petitioner's argument would lead to the impractical situation where the state election codes mean one thing for presidential elections and something else for all other elections, even when these events occur simultaneously. See Amici Br. of Haynes, *et al.* at 22 n.9. Compare *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), with U.S. Const. Amdt. XXVI.

Certainly, the history of Article II, § 1, cl. 2 lends no support to petitioner's binary version of that provision. That the Framers vested in state legislatures the authority to determine the manner of the appointment of presidential electors says nothing about whether state courts and other branches of state government are excluded altogether from their otherwise applicable state-law role in the lawmaking process. The unbroken history of state court involvement in election law interpretation, gubernatorial vetoes, and attorney general advisory opinions shows that Article II, § 1, cl. 2 does not exclude them from this role.

2. Faced with this reality, petitioner is forced to make two fatal concessions. First, he acknowledges that "[i]n some cases, there might be legitimate questions of state law arising from the implementation of a legislatively authorized scheme of appointing electors," and that in such circumstances state courts are authorized to answer those questions. Pet. Br. 48 n.22. Of course, that is precisely what happened in this case. The Florida Supreme Court engaged in routine, garden variety statutory interpretation. See Part I, *supra*.

Second, petitioner acknowledges that "[t]he Florida legislature *could* have delegated to state courts some authority over the manner [of] appointing electors." Pet. Br. 43; see also Amici Br. of Haynes, *et al.* at 14 n.6 ("To be sure, the Florida legislature can assign a role to the Florida Supreme Court.").

But that is precisely what the Florida Legislature has done. In fact, instead of delegating to the Florida courts the power of directly appointing presidential electors, the Florida Legislature has taken the much more modest – and entirely familiar – step of clearly and explicitly authorizing the Florida Supreme Court to interpret all of Florida law, including the Florida Election Code, and in doing so to reconcile inconsistencies, fill gaps, and perform all the traditional functions of judicial review. This judicial authority is recognized by statute, see Fla. Stat. § 20.02(1) ("The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."), as well as by the Florida Constitution itself, Art. V, §§ 1, 3, 4, 5.[10] Tellingly, the Legislature has prohibited judicial review of certain election issues – *but not of any issues regarding presidential electors*. For example, the procedure for post-certification contests regarding state legislative elections expressly provides that "the jurisdiction to hear any contest of the election of a member to either house of the Legislature *is vested in the applicable house* * * * ." Fla. Stat. § 102.171 (emphasis added). Significantly, the state legislature has imposed no similar restriction with respect to judicial review of disputes involving presidential electors.[11]

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[10] The Florida Legislature is authorized to propose amendments to the state constitution. Fla. Const. Art. XI, § 1. Article V, the provision governing the judicial branch and its jurisdiction, was proposed by S.J. Res. 53-D in 1971 and subsequently ratified.

[11] The Florida Legislature observes that "Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with all the usual judicial powers of such courts." Fla. Legis. Br. 9. The Florida Attorney General notes that the Florida election code is a general law, enacted by the legislature "knowing that under Florida's Constitutional and statutory scheme, such general laws are subject to judicial review." Fla. Atty. Gen. Br. 12. Moreover, the Florida Legislature reenacts its entire corpus of statutory law every two years. "The Legislature reenacts this statutory law knowing of the Florida courts' interpretation of it. Such periodic readoption indicates legislative acceptance of those interpretations." *Id.* at 19.

Petitioner maintains that any legislative delegation of authority to courts with respect to elections must be "both clear and explicit." Pet. Br. 43. The delegation here is both, but in any event there is no textual, structural, or precedential support for any such demand. As a Senate report quoted by this Court opines, a legislature's power to delegate its authority under Article II, § 1, cl. 2 is not constitutionally suspect. See *McPherson* v. *Blacker*, 146 U.S. 1, 34-35 (1892) ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors" (emphasis added)). Where the Constitution restricts the branches to which state legislatures may delegate their federal duties, it achieves that result explicitly.[12]

Moreover, petitioner misapprehends the entire situation presented here: When a state legislature enacts an election code subject to judicial review, it is not *transferring* its Article II duty to select a manner of appointing electors; rather, it is *fulfilling* its duty to select a manner. In the instant case, involvement of the state judiciary is not an abdication of the legislature's power under Article II, § 1, cl. 2; it is an exercise of that power – because the power is itself merely the authority to pick a *process* – not necessarily the authority to determine an *outcome*. Indeed, 3 U.S.C. § 5 indicates on its face that Congress at least recognized the propriety of state judicial involvement as a method for resolving "any controversy or contest" regarding the appointment of presidential electors.

Petitioner claims that *McPherson* stands for the proposition that the state legislature's Article II power "'cannot be taken from them or modified by their State constitutions.'" Pet. Br. 47

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[12] Thus, in the Seventeenth Amendment, the Constitution provides that, in the case of vacancies in the Senate, "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." U.S. Const. Amdt. XVII.

(quoting *McPherson*). Even if that argument were right, it would be irrelevant here, for Florida's Legislature has itself made the Florida Election Code subject to judicial review. But petitioner's description of *McPherson* is incorrect. He fails to inform this Court that the quoted language appears in a section of the opinion describing the history of district appointment of electors, 146 U.S. at 35, and is taken from an 1874 Senate Report. The Court's *own* language in *McPherson* does not support petitioner's claim, which is why petitioner is forced to rely on an unacknowledged quotation from a Senate Report. And the state court cases cited by petitioner hold that state courts invoke state constitutions to constrain state legislatures even in the Article II, § 1, cl. 2 context.[13] In fact, *McPherson* clearly contemplates a state judicial role in adjudicating controversies over the appointment of electors. Petitioner himself cites *McPherson* for the proposition that the method of electoral appointment "raise[s] a 'judicial question,' subject to judicial orders." Pet. Br. at 36 (quoting *McPherson*, 146 U.S. at 24). Indeed, *McPherson* not only endorsed the Michigan Supreme Court's power to decide that Michigan's statutory electoral scheme was valid "under the state constitution and laws," but also remarked that the U.S. Supreme Court is "*not authorized* to revise the conclusions of the state court on *these matters of local law*." *McPherson*, 146 U.S. at 23 (emphasis added). The other cases cited by petitioner similarly contemplate a state judicial role in interpreting election statutes.[14]

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[13] See, *e.g.*, *In re Opinion of the Justices*, 107 A. 705, 706-07 (Me. 1919) ("[T]he state by its legislative direction may establish such a method of choosing its presidential electors * * * ; but the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith.").

[14] See *State ex rel. Beeson* v. *Marsh*, 34 N.W.2d 279, 282-84 (Neb. 1948); *McLendon* v. *Slater*, 554 P.2d 774, 778-81 (Okla. 1976). The reliance by petitioner's amici Haynes, *et al.*, on *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876), is highly questionable in light of the holding of *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890), that electors for president and vice president are state officers.

The conclusion that the state court played a constitutionally appropriate role is fortified by a special feature of the text of Article II, § 1, cl. 2. Unlike Article V, Article I, § 4 and the pre-Seventeenth Amendment Article I, Article II, § 1, cl. 2 gives the power to pick electors *not* directly to state legislatures, but rather to the "State[s]," using "such Manner" as the "Legislature * * * may direct." The subject of the sentence is the "State," unlike other constitutional clauses which give power and responsibility to state legislatures as such. Even with respect to Article I, § 4, cl. 1, however, this Court has found that the assignment to state legislatures of the federal duty and authority to prescribe the "Manner" of congressional elections does not exclude state governors, courts, and other bodies with state lawmaking responsibilities. See *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569 (1916).[15]

In sum, once a state legislature has enacted an election code and has entrusted the state courts with the authority to engage in its statutory interpretation, the State has satisfied Article II, § 1, cl. 2.[16]

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[15] *U.S. Term Limits* v. *Thornton*, 514 U.S. 779 (1995) (cited at Pet. Br. 39, 40, 43), in fact supports respondents. In *Term Limits*, this Court noted that the state's "duty" to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" under Article I, § 4, "parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.'" *Id.* at 804-05. Hence, *Term Limits* underscores the relevance of *Growe*, *Smiley* and *Hildebrant* in the context of Art. II, § 1, cl. 2.

[16] Any further constitutional constraints on the ability of a state court to decide a particular presidential election case in one way rather than another would have to be located, it would seem, not in Article II, § 1, cl. 2, but in some other source of law – either in a different federal constitutional guarantee, such as the Republican Form of Government Clause, or in state law. If Article II, § 1, cl. 2 did embody some kind of check to ensure that, in extreme cases, a state court did not unilaterally seize the legislature's power – by, for example, itself directly naming the state's presidential electors with

CONCLUSION

The judgment should be affirmed.

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November 30, 2000

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no colorable statutory basis for doing so – the check would surely not resemble the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), or any of the various formulations proposed by petitioner's amici. See Amici Br. of Haynes, *et al.* at 23 n.10 ("grievously wrong" or "merely erroneous"). Instead, the check would resemble a standard more deferential to state courts. See n.4, *supra*.